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13 SUCCESSFACTORS, INC.

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 OAKLAND DIVISION  
17

18 SUCCESSFACTORS, INC., a Delaware  
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware  
22 corporation, and DOES 1-10, inclusive,

23 Defendants.  
24  
25  
26  
27  
28

Case No. CV 08 1376 CW

**PLAINTIFF'S REPLY MEMORANDUM IN  
SUPPORT OF EXPEDITED DISCOVERY**

Date: March 27, 2008  
Time: 2:00 p.m.  
Courtroom: 2  
Judge: Hon. Claudia Wilken

Date of Filing: March 11, 2008  
Trial Date: No date set

## INTRODUCTION

Plaintiff SuccessFactors, Inc. (“SuccessFactors”) has been able to narrow and tailor the discovery it seeks on an expedited basis based on disclosures Defendant Softscape, Inc. (“Softscape”) has made to date. Because Softscape has now conceded that it prepared the Presentation and does not dispute its falsity, Plaintiff seeks expedited discovery to determine principally two issues: (1) how Defendant compromised SuccessFactors’ confidential sales demo account and used this and other information pilfered from SuccessFactors, and (2) which person(s) orchestrated, and how, the preparation and targeted distribution of the Softscape Presentation to numerous customers and prospects. Defendant has failed to offer any meaningful information about the Presentation, which is at the center of this controversy, to either the Court or Plaintiff SuccessFactors. Defendant has thus far refused to reveal which employees, officers or agents created the document, to whom it was distributed, and what contemporaneous instructions were given as to its use or distribution.

The expedited discovery, along with the preservation order requested by SuccessFactors, are necessary for three reasons. First, in light of Plaintiff’s evidence of the unauthorized access to Plaintiff’s computers under false pretenses, there is a significant risk that critical and fleeting evidence will be lost from the very people who were responsible for the pretexting if the Court does not allow expedited discovery. Second, Plaintiff needs expedited discovery to mitigate the harm that Defendant’s actions are causing to SuccessFactors’ goodwill with its customers, and to protect against future break-ins of Plaintiff’s computer and data systems. Expedited discovery will allow Plaintiff to try to stem the harm to its reputation, customer relations, and good will in a timely way and minimize the risk of future hacking into its confidential computer systems. Third, only by knowing promptly the full scope of Defendant’s illicit escapades can SuccessFactors ensure that it receives adequate relief. Defendant’s remarkable record of defalcations is only starting to come to light. These are serious misbehaviors, which deserve immediate attention.

Plaintiff has learned much from its own investigation, but there are limits to what Plaintiff can learn independently. Defendant’s inability or unwillingness to answer even the most fundamental questions about the use and distribution of the Presentation increases the urgency of

1 Plaintiff's remaining, tailored requests. Accordingly, for the reasons stated in its moving papers  
 2 and in this reply, Plaintiff respectfully requests an order permitting it to immediately issue its  
 3 revised and slimmed down set of eight document requests and nine 30(b)(6) deposition topics. In  
 4 addition, Plaintiff seeks a further order to move the current deadline for the parties to participate  
 5 in the Rule 26(f) conference from May 27 to April 10, 2008, so that discovery may proceed  
 6 without undue delay.

### 7 **FACTUAL RECORD**

8 Plaintiff's independent investigation has revealed proof that Softscape impersonated a  
 9 customer in an effort to obtain access to SuccessFactors' confidential sales materials. A customer  
 10 prospect identifying herself as Ely Valls set up two sales demonstration meetings on February 19  
 11 and 21, 2008. Ms. Valls represented herself to be the purported owner of a 50-person shoe  
 12 company called "New Millenium Shoe" in San Juan, Puerto Rico. SuccessFactors has now  
 13 obtained evidence linking Softscape to the sham meetings set up by Ms. Valls in Puerto Rico.

14 Defendant's CEO, Dave Watkins, is a member of the social-networking site, Facebook,  
 15 and has a page that directly links him to "Ely Valls" of Puerto Rico. Declaration of Patrick E.  
 16 Premo in Support of SuccessFactors, Inc.'s Reply Memorandum in Support of Expedited  
 17 Discovery ("Premo Reply Decl.") ¶ 11, Ex. 6. This is just one of a number of connections that  
 18 SuccessFactors has identified in its detailed declarations submitted to the Court. *See* Declaration  
 19 of James Matheson in Support of Plaintiff's Application for a Temporary Restraining Order and  
 20 Order to Show Cause re Preliminary Injunction; Declaration of James Matheson in Support of  
 21 Preliminary Injunction and Expedited Discovery; Declaration of Jorge Andes Corrales in Support  
 22 of Preliminary Injunction and Expedited Discovery; and Premo Reply Decl.

23 SuccessFactors does not know the full extent of the Defendant's use of information from  
 24 the phony sales meetings or unauthorized misappropriation of its data from the demo account, but  
 25 it needs the discovery to determine this promptly. SuccessFactors also needs to learn the full  
 26 extent of the email distribution of the Presentation. Plaintiff has made efforts to seek cooperation  
 27 with Defendant on both expedited discovery and participation in a Rule 26(f) conference so that  
 28 both parties can begin discovery. Premo Decl. ¶¶ 12-14. To date, Defendant has rejected these

1 efforts.

## 2 ARGUMENT

### 3 **I. EXPEDITED DISCOVERY IS NECESSARY TO IDENTIFY THE SOURCE OF** 4 **THE COMPUTER HACK AND SCOPE OF THE UNLAWFUL DISTRIBUTION** 5 **OF THE PRESENTATION.**

6 Defendant contends that if provisional relief is not granted to Plaintiff, expedited discovery  
7 is not justified. To the contrary, expedited discovery serves a different purpose from the  
8 preliminary injunction that SuccessFactors seeks. The preliminary injunction would prevent  
9 Defendant, or those in concert with Defendant, from causing irreparable harm to SuccessFactors'  
10 hard-earned goodwill. Expedited discovery, on the other hand, allows Plaintiff to try to protect  
11 itself from that irreparable harm. By learning which of its customers and prospects may have been  
12 recipients of the Presentation or the misinformation within it, Plaintiff can try to salvage its  
13 reputation. By learning how and when Defendant accessed Plaintiff's computers without  
14 authorization, Plaintiff can implement security measures to reduce the risk of future breaches of its  
15 proprietary systems.<sup>1</sup> Any delay in this discovery would cause Plaintiff to remain unnecessarily  
16 vulnerable to continued calumny or security risks.

### 16 **II. PLAINTIFF ONLY SEEKS VERY LIMITED DISCOVERY ON AN EXPEDITED** 17 **BASIS.**

18 Contrary to Defendant's hyperbole that the proposed discovery comprises "nearly all  
19 discovery that is possible in this case,"<sup>2</sup> Plaintiff has submitted focused and limited requests.  
20 See Premo Reply Decl. ¶¶ 3, Exhs. 1 & 2. SuccessFactors' Document Requests and Deposition  
21 Topics relate directly to Softscape's trademark infringement, false advertising, and/or  
22 unauthorized access to SuccessFactors' computer systems.

23  
24 <sup>1</sup> Although the relief sought here is distinct from Plaintiff's motion for injunctive relief, this  
25 information would also be essential for Plaintiff to be able to enforce the terms of the preliminary  
injunction if granted by the Court.

26 <sup>2</sup> Defendant's concessions that it authored the false and misleading Presentation and accessed  
27 Plaintiff's computers allowed a substantial reduction in the number of requests. But even the  
28 original requests were targeted toward specific computers, persons, and documents. Plaintiff did  
not seek expedited discovery on wide ranging topics such as damages or general sales tactics. Nor  
did Plaintiff seek multiple depositions.

1 Deposition Topics One through Four, and Document Requests One through Three, pertain  
2 directly to the Presentation, its purpose, and intended audience.

3 Deposition Topic Five, and Document Request Four pertain, to recipients of the  
4 Presentation or the information therein. Given the dearth of information about Defendant's  
5 investigation, it is likely that Plaintiff is not aware of all the recipients. There is a substantial need  
6 for Plaintiff to mitigate the harm to its goodwill as quickly as possible.

7 Deposition Topics Six through Eight, and Document Requests Five through Seven, pertain  
8 to how Softscape may have obtained information about SuccessFactors and accessed  
9 SuccessFactors' computers without authorization.

10 The last Deposition Topic and Document Request pertain to how Softscape obtained and  
11 used SuccessFactors' trademarks. Such information will help Plaintiff prevent future access to its  
12 presentation templates and other files containing its trademarks.

13 Discovery of this information is necessary to assist SuccessFactors in knowing who  
14 participated in the preparation of the Presentation, and thereby help in determining who was  
15 behind the "anonymous" distribution.

16 SuccessFactors' original discovery requests were limited. SuccessFactors has gone one step  
17 further and narrowed the requests even more. In light of Softscape's admission that it did, in fact,  
18 prepare the Presentation and its concession (at least for this phase) as to the falsity of statements  
19 within the document, SuccessFactors is willing to forego, at least on an expedited basis, the  
20 discovery that was previously aimed at those issues. The remaining discovery is now limited to  
21 eight document requests and nine 30(b)(6) deposition topics.

22 **III. THE FACTS SURROUNDING THIS CASE SUGGEST THERE IS A**  
23 **SIGNIFICANT RISK OF DATA LOSS.**

24 Defendant claims to have spent the past ten days investigating the "leak" of the  
25 Presentation, yet still has not explained anything about how it happened or by whom. Defendant  
26 says there are hundreds of computers and data storage devices that may possibly be implicated by  
27 the IP addresses Plaintiff found in the course of its investigation. This suggests that there is a  
28 multiplied risk that important, transitory data will be erased or lost unless the discovery process

1 begins now. Furthermore, some of the access to Plaintiff's computers appears to have originated  
 2 from personal computers not within the four walls of Softscape. It is hard to accept Defendant's  
 3 reassurance that there will be no lost evidence when Defendant seems so uncertain from its  
 4 investigation what should be protected and preserved.

5 Softscape's sole declarant says that the company has a "commercially reasonable document  
 6 retention policy" in place. *See* Mohr Decl. ¶ 10. Commercially reasonable destruction policies  
 7 allow for routine purging and destruction of electronic records. What Softscape's declarant fails to  
 8 state is whether Softscape has instituted a litigation hold to prevent this routine purging or what  
 9 records would be covered by any such hold. Defendant should immediately mirror image the  
 10 computers of all key players. But Defendant refuses even to engage in the basic, Rule 26(f)  
 11 identification of data preservation process that Plaintiff has requested.

12 Plaintiff reasonably fears that critical evidence may be lost in the absence of timely  
 13 intervention by the Court. Only expedited discovery and an order that all of the relevant data must  
 14 be preserved will ensure that important data will not disappear.

### 15 CONCLUSION

16 For the foregoing reasons, Plaintiff SuccessFactors, Inc., respectfully requests that the Court  
 17 allow the expedited, revised discovery as proposed by Plaintiff, enter a preservation order as  
 18 proposed by Plaintiff, and move the current deadline for the parties to participate in the Rule 26(f)  
 19 conference from May 27 to April 10, 2008, so that discovery may proceed without undue delay.

20  
 21 Respectfully submitted,

22 Dated: March 21, 2008

FENWICK & WEST LLP

23  
 24 By: /s/ Patrick E. Premo

25 Patrick E. Premo  
 26 Attorneys for Plaintiff SUCCESSFACTORS, INC.

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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16 OAKLAND DIVISION  
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18 SUCCESSFACTORS, INC., a Delaware  
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware  
23 corporation; and DOES 1-10, inclusive,

24 Defendants.

Case No. CV 08 1376 CW

**[PROPOSED] ORDER GRANTING  
PLAINTIFF'S RENEWED APPLICATION FOR  
EXPEDITED DISCOVERY**

25 On March 27, 2008 at 2:00 P.M. in Courtroom 2, the Court heard Plaintiff SuccessFactors,  
26 Inc.'s ("SuccessFactors") Application for an Order Allowing Expedited Discovery, with opposition  
27 by Defendant Softscape.

28 ///

**Order with Respect to Expedited Discovery**

Having reviewed and considered all papers on file and argument of counsel, and the matter having been submitted, the Court finds that Plaintiff has presented good cause for expedited discovery, and Plaintiff's motion for expedited discovery is granted as follows:

1. Softscape, Inc. shall provide written, verified responses and responsive, non-privileged documents to SuccessFactors' First Set of Document Requests on or before April 10, 2008.

2. Softscape, Inc. shall also appear, through one or more representatives, for an oral deposition pursuant to Federal Rule of Civil Procedure 30 (b)(6) on or before April 17, 2008, with the specific date and time to be agreed upon by the parties after meeting and conferring.

**Order with Respect to Preservation of Evidence**

The Court finds:

1. Plaintiff is entitled to a fair opportunity to prove its case without spoliation or loss of evidence.

2. Plaintiff may suffer irreparable injury to its ability to obtain all relevant evidence if the same is destroyed or lost before trial on the merits can be held.

GOOD CAUSE HAVING BEEN SHOWN, IT IS ORDERED AS FOLLOWS:

Defendant Softscape and its agents, servants, and employees, and all persons acting under, in concert with, or for them shall, during the pendency of this action:

1. Preserve all evidence, data, records, and things in their possession or control, including all electronic records, records of internet transactions or communications, and records of officers, directors, consultants or employees whether maintained on facilities provided by Softscape or otherwise utilized by such persons, related to:

- a. The genesis, creation, review, or revision of the Presentation.
- b. The basis for any assertions in the Presentation.
- d. The identity of any actual, potential, or intended recipients of the Presentation or of any communications about the Presentation.



- e. Communications of Softscape with any person not employed by Softscape (other than its attorneys) concerning the Presentation.
- f. Communications among employees of Softscape concerning the Presentation.
- g. Communications between Softscape and Sears, Regions Bank, Intelsat, David Sinkfield, ICMA Retirement, Harris-Williams, or any current or former SuccessFactors employee or consultant.
- h. The user name "John Anonymous," associated e mail address "hcmknowledge2008a@gmail.com," and all communications from, with or concerning same.
- i. Access from any Softscape computer to SuccessFactors' website, online customer community, or online demonstration environments, including but not limited to access via the user name "ACE275," and any information obtained from such access.
- k. Any data storage media for any computer that was involved in the creation, modification, collection of information for, sharing, or e-mailing of the Presentation.
- l. Identity, access, and use of any computer associated with IP addresses 68.236.68.19 or 82.108.171.66 or 24.34.56.79 or 98.216.168.122 and involved in the creation, revision, storage, communication, or distribution of the Presentation or any part thereof.
- m. Relationship of Javier Cruz, Ely Valls, or New Millenium Shoe, or anyone posing as them, with Softscape or SuccessFactors and any communications among any of them.

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n. Softscape's procurement of images of, copying of, or use of SuccessFactors' trademarks or PowerPoint template.

**IT IS SO ORDERED.**

Dated: March \_\_\_, 2008

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The Honorable Claudia Wilken  
United States District Court Judge

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